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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THIS CASE WILL AFFECT THE RESOLUTION OF MANY OTHER CASES UNDER BOTH FELA AND THE COMMON LAW

In his opposition brief, plaintiff-respondent ("plaintiff") asserts that this is a case of little precedential value because it is a FELA case and because plaintiff's asbestos exposure, based on the Second Circuit's characterization of it as "massive" and "unusual," was "unique." *See* Resp. Br. at 5-9. Yet, the "massive" exposure standard adopted by the Second Circuit and urged by plaintiff does not impose any meaningful constraints upon claims for emotional distress, as this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2408-10 (1994), requires.[1]

The term "massive" exposure is not, as plaintiff seems to believe, a quantifiable or objective standard by which to limit liability. The only guidance the Second Circuit provides is to distinguish "massive" exposure from everyday exposure to asbestos in the "ambient air." (A-20) Thus, "massive" exposure becomes any exposure to asbestos at some indeterminate level above normal background levels. Such an ill-defined standard potentially renders every workplace exposure a "massive" one.[2]

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[1] Because the District Court directed a verdict for Metro-North at the close of plaintiff's case, no ultimate findings of fact were made. In any event, the Second Circuit's creation of a "massive" exposure standard for claims of emotional distress is simply incorrect. Under *Gottshall*, such claims are cognizable under FELA only if they meet the common law zone of danger test -- which plaintiff's claims in this case do not. *See* Point II of Metro-North's Petition and Point II *infra*.

[2] Plaintiff attempts to supply a definition of "massive" exposure by referring repeatedly to OSHA standards regarding asbestos exposure. Yet, the Second Circuit's decision, which is the subject

Moreover, contrary to plaintiff's assertions, the fact that this is a FELA case does not mean that the Second Circuit's decision is unimportant or of narrow applicability. As the American Association of Railroads ("AAR") observes in its *amicus* brief, since 1990 more than 14,000 new asbestos personal injury cases have been filed under FELA against American railroads. *See* AAR Br. at 7-8. Furthermore, the decision will inevitably be cited as precedent by FELA plaintiffs alleging exposure to a host of other substances. *See id.* at 9 ("Since 1990, over 2000 FELA claims have been filed against railroads alleging exposure to other toxic substances."). Thus, even as to FELA cases, the importance and precedential value of the Second Circuit's decision extend far beyond the cases of this plaintiff and his co-workers.

Plaintiff also argues that this FELA case is of little importance because it is not "binding precedent" in common law or other cases. *See* Resp. Br. at 7. This argument ignores the fact that, in deciding issues of state common law, federal and state courts routinely look to FELA decisions because FELA decisions analyze and apply common law principles. For example, this Court's 1994 opinion in *Gottshall* has already been cited in a number of state court opinions applying the zone of danger test under the common law.[3] Similarly, *Urie v. Thompson*, 337 U.S. 163 (1949), and *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d

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of this certiorari petition, never refers to those OSHA standards, which do not in any event purport to set a legal threshold for emotional distress claims.

[3] *See, e.g., Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994); *Kraszewski v. Baptist Medical Ctr.*, 916 P.2d 241, 246 n.10 (Okla. 1996); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995).

Cir.), *cert. denied*, 474 U.S. 864 (1985), have been cited numerous times by federal and state courts in common law cases.[4] Clearly, if the Second Circuit's opinion is allowed to stand, federal and state courts will look to it in deciding claims asserted under state common law as well as under state and federal statutes. In fact, in construing FELA in this case, the Second Circuit expressly purported to apply "common-law principles." (A-16) That the Second Circuit's decision is not *binding* except in FELA cases does not negate the importance of the decision and the influence it is likely to exert.

Nor is the precedential value of the Second Circuit's decision limited, as plaintiff contends, because plaintiffs covered by FELA may sue their employers for injuries caused by the employer's negligence, while other workers are restricted to worker's compensation. *See* Resp. Br. at 8. Such other workers can and routinely do sue manufacturers, suppliers, and others for injuries caused by exposure to asbes-

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[4] *See, e.g., Bendix Corp. v. Stagg*, 486 A.2d 1150, 1152 (Del. 1984) (citing *Urie*); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 499-500 (Ky. 1979) (same); *Burns v. Jacquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (following *Schweitzer*), *review dismissed per stipulation*, 781 P.2d 1373 (Ariz. 1989); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986) (same); *Giffear v. Johns-Manville Corp.*, 632 A.2d 880, 886 (Pa. Super. Ct. 1993) (same), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 n.8 (D. Haw. 1990) (Hawaii law) (same).

tos.[5] The Second Circuit's opinion will undoubtedly be relied upon by plaintiffs in such cases.

Plaintiff also improperly attempts to minimize the importance of this case by arguing that asbestos exposure has become a rare event. *See* Resp. Br. at 7-8. The reality is, however, that asbestos remains present in the nation's schools, homes, office buildings, factories, and public edifices. People repairing, renovating, demolishing, or removing asbestos from buildings will undoubtedly at times be exposed to significant levels of asbestos.[6] Such exposures will in all probability give rise to suits such as the instant one. Moreover, the Second Circuit's decision in this case will be looked to as precedent not only in new exposure cases, but also, because of the long latency period for asbestos-related disease, in the huge numbers of asbestos cases still being filed stemming from earlier exposures.

II. THE ZONE OF DANGER TEST DOES NOT SUBSUME THE PHYSICAL IMPACT TEST

In his brief, plaintiff argues that the zone of danger test adopted by this Court in *Gottshall* "subsumes" the old "physical impact" test. *See* Resp. Br. at 11. This argument is based on an untenable reading of this Court's opinion in

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[5] Approximately 37,000 asbestos personal injury cases are now pending in the federal court system. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *1 (E.D. Pa. May 2, 1996). As of 1992, an estimated additional 130,000 asbestos cases were pending in state courts. *See* W. W. Schwarzer, et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1529, 1530 (1995).

[6] *See, e.g.*, W. Keith C. Morgan & Anthony Seaton, *Occupational Lung Diseases* 315 (1995); W. Raymond Parkes, *Occupational Lung Disorders* 415 (3d ed. 1994).

Gottshall. In *Gottshall*, this Court considered three possible tests for emotional distress claims and chose one of those tests -- the zone of danger test. *See Gottshall*, 114 S. Ct. at 2410-11. Plaintiff's argument that, in adopting the zone of danger test, this Court also adopted the physical impact test is not supported by the language or logic of the decision. *See* Metro-North's Petition at 18-20. Nor is it supported by the myriad cases applying the zone of danger test under the common law. These cases simply do not interpret the zone of danger test to include a separate physical impact test that has nothing to do with the zone of danger.

Moreover, plaintiff's assertion that any person who sustains some kind of physical impact is by definition in the zone of danger is erroneous. *See* Resp. Br. at 11-12. This argument could apply only where the facts of the case demonstrate that a zone of danger -- *i.e.*, a "location in which the plaintiff is at 'immediate risk of physical harm'" -- existed. *See Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (citation omitted). In this case, there was no zone of danger of *immediate* physical harm, and there can be no recovery under the zone of danger test.[7]

Indeed, plaintiff does not support his argument with any decision from any court that either explicitly or implicitly

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[7] Furthermore, contrary to plaintiff's assertion (Resp. Br. at 12 n.3), Metro-North does not argue that the zone of danger test *excludes* plaintiffs who sustain a physical impact. Rather, because "[w]hether the plaintiff has suffered an impact bears little relationship to the [emotional] harm," the zone of danger test treats impacted and unimpacted plaintiffs alike: both must be in the zone of danger of immediate physical injury to recover. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982).

interprets the zone of danger as subsuming the physical impact test. *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), upon which plaintiff relies, does not support such a reading of *Gottshall*. In *Marchica*, the plaintiff was in fact in a zone of danger of immediate physical injury and felt contemporaneous fear of immediate physical injury -- infection with the AIDs virus, which, once contracted, is nearly always fatal. Simply put, *Marchica* did not do away with the traditional common law elements of the zone of danger test.[8]

III. THE SECOND CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *SCHWEITZER*

Plaintiff claims that the Second Circuit's decision does not conflict with the Third Circuit's decision in *Schweitzer*, ignoring the Second Circuit's explicit acknowledgement of that conflict. (A-20 to A-21) Plaintiff mistakenly asserts that no conflict exists because this is an emotional distress case and *Schweitzer* was a physical injury case. *See* Resp. Br. at 9. Contrary to plaintiff's assertions, the *Schweitzer* rule that a plaintiff exposed to asbestos has no cause of action until he develops an asbestos-related disease properly governs this

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[8] Moreover, in *Marchica*, the plaintiff had been "stabbed" by a hypodermic needle, a co-worker saw blood coming from the plaintiff's "puncture wound," 31 F.3d at 1200, and the plaintiff's "emotional distress was the direct result of a documented physical injury." *Id.* at 1204. Later case law on hypodermic needle punctures applies traditional tort law principles allowing emotional distress damages flowing from a physical injury. *See, e.g., Murphy v. Abbott Labs.*, 930 F. Supp. 1083, 1085-87 (E.D. Pa. 1996) (nurse stuck by needle used on AIDS patient could recover for emotional distress flowing from physical injury; distinguishing asbestos exposure cases).

emotional distress case. Under *Gottshall*, claims for emotional distress, in the absence of physical injury, are cognizable under FELA only when they meet the zone of danger test. As discussed in Point II of Metro-North's Petition, this asbestos exposure case does not meet the zone of danger test. Therefore, the fact that under *Schweitzer* plaintiff has no physical injury is, as a matter of law, dispositive of his emotional distress claims. Thus, the result reached by the Second Circuit in this case is directly opposed to the result that *Schweitzer* would compel.

Plaintiff's claim that *Schweitzer* is inapplicable because it was a bankruptcy case misses the point. In order to resolve the bankruptcy issues in that case, the *Schweitzer* court had to determine, based on "generally applicable principles of tort law," when an asbestos claimant has a cognizable injury under FELA. *Schweitzer*, 758 F.2d at 941-42. Indeed, *Schweitzer's* rule that an asbestos plaintiff has no cause of action until he manifests an asbestos-related disease has been repeatedly followed in non-bankruptcy cases involving emotional distress claims. *See* cases cited *supra* at n.4 and in Metro-North's Petition at 8 & n.6.

IV. PLAINTIFF HAS NOT SUSTAINED "BODILY HARM," AND, IN ANY CASE, BODILY HARM CANNOT SUPPORT DAMAGES FOR NON-SEVERE EMOTIONAL DISTRESS

Plaintiff argues that, although he has no "physical injury," he has "bodily harm," which justifies recovery of damages for his admittedly non-severe emotional distress. *See* Resp. Br. at 14-16. The authorities cited by plaintiff do not support his

false distinction between bodily harm and physical injury.[9] Other than the Second Circuit, no court, even those cited by plaintiff, has allowed damages for non-severe emotional distress unless such damages flow from a physical injury or another independent tort. *See* Petition at 24.

Plaintiff incorrectly relies upon the Restatement (Second) of Torts to argue that he has suffered "bodily harm." Under the Restatement, "bodily harm" is defined as a "physical *impairment* of the condition of another's body, or physical pain or illness." Restatement § 15 (emphasis added). As used in the Restatement, the term "'harm' implies a loss or detriment to a person, and not a mere change or alteration ." *Id.* § 7 cmt. b. Only a physical change that is detrimental constitutes a bodily harm. *Id.*

Under these principles, it is clear that plaintiff has sustained no bodily harm. It is undisputed that plaintiff here has no asbestos-related disease or illness. X-rays of his lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure. (A-13) Indeed, even where a plaintiff has pleural thickening or scarring, courts have held that, unless actual impairment or symptoms are present, such scarring and thickening are merely changes or alterations that do not constitute bodily harm or compensable physical injury within the meaning of the Restatement. *See, e.g., Simmons v. Pacor, Inc.*, 674 A.2d 232, 236-37 (Pa.

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[9] Plaintiff seems to suggest that "bodily harm" is some lesser degree of harm than a "physical injury." The difference between the two terms as they are used in the Restatement (Second) of Torts is that "physical injury" is a legal term, whereas "bodily harm" is a factual term. In the Restatement, a physical injury is a bodily harm caused by the "invasion of any legally protected interest." *See* Restatement (Second) of Torts § 7 (1965).

1996) (citing cases); *see also Schweitzer*, 758 F.2d at 942 (subclinical changes from asbestos exposure do not constitute the "actual loss or damage . . . required to sustain a cause of action under generally applicable principles of tort law"); *accord, Burns*, 752 P.2d at 30-31; *Bernier*, 516 A.2d at 543; *Giffear*, 632 A.2d at 886-87; *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567-68.[10]

Moreover, even if plaintiff were correct in his assertion that he has "bodily harm," that "bodily harm" would not entitle him to damages for non-severe emotional distress. Plaintiff incorrectly relies upon section 924 of the Restatement to support this argument. *See* Resp. Br. at 16. In fact, section 924 does not purport to change the basic rule of tort law that a plaintiff may not recover damages in the absence of an injury. *See* Restatement § 902 & cmt. a ("Damages flow from an injury."). Plaintiff here has no physical injury to support emotional distress damages. In sum, plaintiff's argument that an alleged "bodily harm" entitles him to damages for emotional distress that was admittedly non-severe is without basis in law or fact.

V. FELA FORBIDS MEDICAL MONITORING DAMAGES ABSENT PHYSICAL INJURY

Plaintiff also argues that section 924 of the Restatement (Second) of Torts authorizes medical monitoring damages

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[10] *See also In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 239863, at *3; *Caputo v. Boston Edison Co.*, Civ. A. No. 88-2126-Z, 1990 WL 98694, at *4 (D. Mass. July 9, 1990), *aff'd*, 924 F.2d 11 (1st Cir. 1991); *Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761, at *1 (N.D. Ill. May 9, 1986). Moreover, contrary to plaintiff's contentions, *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401, 1406-07 (W.D. Mo. 1988), supports Metro-North's position.

based upon his alleged "bodily harm." *See* Resp. Br. at 20. As discussed above, plaintiff has no "bodily harm," and his reliance on section 924 is misplaced.

Furthermore, plaintiff does not even address FELA's statutory injury requirement. Instead, plaintiff cites the Third Circuit's two decisions in *In Re Paoli Railroad Yard PCB Litigation,* 916 F.2d 829 (3d Cir. 1990), *cert. denied,* 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied,* 115 S. Ct. 1253 (1995), in which the court predicted that Pennsylvania law would allow medical monitoring damages in the absence of physical injury. These are not FELA cases and do not address a statutory injury requirement. In addition, their validity has been severely undermined by the Pennsylvania Supreme Court's decision in *Simmons v. Pacor, Inc.,* 674 A.2d 232 (Pa. 1996). Recent federal district court decisions have "read the *Simmons* decision as holding that mere exposure to significant levels of asbestos, without a demonstrable physical consequence such as pleural thickening, does not support a claim for medical monitoring." *Fried v. Sungard Rec. Servs.,* 1996 WL 520404, at *2 (E.D. Pa. Sept. 12, 1996); *see also Fried v. Sungard Rec. Servs.,* 925 F. Supp. 375, 377 (E.D. Pa. 1996).

CONCLUSION

The Court should grant certiorari in this case.

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